

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
ANTI-CORRUPTION COURT KOLOLO
HCT-OO-AC-CN-0018-2018

UGANDA:.....APPELLANT

VERSUS

SP AJUNA MARK & 2 ORS:.....RESPONDENTS

BEFORE: LAWRENCE GIDUDU

JUDGMENT

The state appealed against the acquittal of the respondents by the Chief Magistrate on charges of Embezzlement of 130 million being part of an exhibit and of Abuse of Office.

The respondents are police officers comprising the Former DPC, and OC/CID of Kumi District.

The brief facts giving rise to this appeal are that, a one Makhoha Godfrey, a guard working with Security Group Africa, was arrested soon after alighting from a taxi at Kumi Bus Park at 3am on 31st of December 2015.

He was suspected to have stolen money together with other guards from their employer during cash in transit for a client bank. He was taken to Kumi police Station where upon the DPC and the OC/CID formerly arrested him and caused his detention and subsequent transfer to

Kampala. Makhoha and others were charged and eventually imprisoned for stealing cash in transit.

Upon arrest, Makhoha Godfrey had four bags. Some of the bags had money. According to Detective SP Kasozi Jackson who was the OC/CID, the amount was 150million which he passed over to Police CID Headquarters together with the suspect. But evidence from prosecution witnesses such as Corporal Opio PW3, Sergeant Eunu, PW4 William Zebloni, PW6 SSP Aboku Patrick, PW10 Ikilai Halima, PW11 Osako JB, is that they received or recovered monies given out by Detective SP Kasozi.

For example, 14 million was recovered from one Adongo mother to Makhoha, 1.7 million recovered from Asako brother of Makhoha, 683,000/= out of 2million that had been given by Detective SP Kasozi was recovered from Zebloni Wasiima, PW4, 480,000/= recovered from sergeant Asio by PW6, 70,000 recovered from Corporal Emune by PW6, 1,490,000/= recovered from Corporal Oturuke, 80,000/= recovered from Sergeant Otim, 500,000/= returned by D/IP Mafabi (PW8), 190,000/= recovered from Ikilai Halima (PW10), 150,000/= recovered from PC Namahe Vianne PW9, and 170,000/= recovered from Detective SP Kasozi.

This money is far and above the 150 million declared by Detective SP Kasozi as the only money found on the suspect Makhoha Godfrey. It's from this scenario that the prosecution alleges that the respondents stole 130 million and abused the authority of their offices by sharing out part of the exhibit.

The respondents denied any wrong doing and contended that the money found on Mr. Makhoha Godfrey and which they declared was 150

million. This version is supported by witnesses such as D/IP Mafabi, PW8, and PW16 Eryau Julius Ceaser.

In her judgment, the Trial Chief Magistrate held that the prosecution had failed to prove that the total amount of money stolen was 130 million because the evidence adduced fell far short of that figure.

She also held that failure to adduce evidence from Makhoha Godfrey, created doubt as to whether the money SP Kasozi is alleged to have distributed was part of the exhibit.

It was her finding that without Makhoha's evidence it was not possible to tell that the money found on Makhoha was more than 150 million. She, therefore, concluded that the respondents could not be held liable for Abuse of Office when there was no evidence by Makhoha Godfrey or any other witness to show that more than 150 million was found on him.

Two grounds of Appeal were filed which I summarize below;

1. That the learned Chief Magistrate erred in law and fact when she disregarded vital evidence adduced by the prosecution.
2. That the Learned Chief Magistrate erred in law and fact when she failed to make an Order regarding the disposal of the exhibit.

My duty as a 1st Appellate Court is to subject the evidence to fresh and exhaustive scrutiny and draw my own conclusions without ignoring the judgment appealed from. I am mindful that I never saw nor heard the witnesses testify.

I will start with Ground 2 which relates to the disposal of an exhibit by the Trial Court. With respect this Ground of Appeal was misconceived because it is not the duty of an Appellate Court to decide what should be done to an exhibit during a trial. That is a matter for the Trial Court

under sections 201 and 202 of the MCA. I directed that the Chief Magistrate shall be moved by the prosecution to make the appropriate Orders under those provisions of the law. This means that there was only one ground of appeal.

Ms. Harriet Angom, learned state attorney criticised the Trial Court for holding that the prosecution failed to adduce the evidence of the source of the money that Detective SP Kasozi is alleged to have distributed. She also complained that the Trial Chief Magistrate erred in holding that the prosecution should have adduced evidence to prove that 130 million had been stolen from the exhibit.

She contended that about 16.3 million was exhibited in court as money recovered from some of the witnesses. This money was got from SP Kasozi, the OC/CID who managed the exhibit. This, according to her was sufficient evidence that the respondents had embezzled the money. It was her view that the court should have convicted the respondents for embezzling the money that the prosecution exhibited in court.

On the charges of Abuse of Office, Ms. Angom submitted that the acts of the respondents in distributing money which they were employed to protect and exhibit were arbitrary and prejudicial to their employer. This money was distributed as charity to those who were on duty and some money was sent through PW10 allegedly as salary for Makhoha Godfrey yet the respondents were not the employers of the said Makhoha. She contended that these were arbitrary acts which rendered the respondents culpable for Abuse of Office.

As regards the source of money, she contended that there was strong circumstantial evidence which points to the fact that the money could only have been part of the exhibits found with Makhoha.

In reply, Mr. Muhumuza Kiiza for the respondents supported the findings of the Trial Chief Magistrate contending that failure to adduce evidence showing that a total of 130 million had been stolen was fatal to the prosecution case.

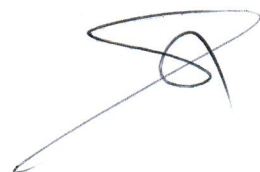
He also agreed with the Trial Chief Magistrate that there was no evidence regarding the source of the money that Detective SP Kasozi is alleged to have distributed. In short his view was that the recovered money which was tendered in court has no established source.

I understood him to mean that the respondents could not be found guilty for stealing money from an exhibit without evidence that this money was part of the exhibit found on Mr. Makhoha.

Perusal of the record reveals that these charges arose from suspicion that more money than the 150 million was recovered from Makhoha because police officers that were on duty on the night that Makhoha was arrested, were gifted with free money by the OC/CID. The OC/CID did not tell these police officers where he had got money to give them for free.

There were also other officers such as Corporal Opio PW3 who escorted the suspect and the exhibit to Kampala and when he returned to Kumi, his colleagues advised him to pick money from the OC/CID for the role he had played. When he went to the OC/CID, he was told the money was over. He was left grumbling.

It is these suspicions that led to an investigation by Regional Police officers such as PW6, SSP Aboku Patrick. The investigation led to the recovery of money from police officers who were on duty that night and civilian relatives of Makhoha- the key suspect. Money recovered amounted to 16,333,000=



All those from whom money was recovered identified D/SP Kasozi, OC/CID, as the giver. They had not done anything to warrant that money except for working at night when Makhoha was brought to the station. Indeed when PC Namahe, PW9 was given 150,000= by the D/Kasozi, she asked what it was for? She was told to go away. This was a sort of cash bonanza by the “gracious” OC/CID SP Kasozi.

The respondents denied embezzling part of the exhibit and insisted that only 150 million was recovered from the suspect. They never made any reference to the monies that were recovered from some of the persons who testified as prosecution witnesses. Specifically D/SP Kasozi denied giving out any money to any police officer at the station. Most of their testimonies were relating to what happened to each one of them after their arrest.

After evaluating the evidence adduced by the prosecution, vis a vis the defences raised by the respondents, it is clear to me that Makhoha had more money on him than the 150 million which was declared.

There is strong circumstantial evidence surrounding the arrest of Makhoha and the treatment of the exhibit found on him which suggests that there was a cash bonanza that followed his arrest.

There is undisputed evidence by witnesses such as, D/IP Busima Godfrey PW1, D/IP Egungu Samuel PW2, D/CP Opio PW3, and D/SSP Aboku Patrick PW6 which showed that investigations into the cash bonanza led to the recovery of money from civilians and police officers who all admitted to have received it from D/SP Kasozi who was the OC/CID. These recovered funds totaling to about 16.3 million, were exhibited through the testimony of PW1. Some of this money was recovered from a banana plantation buried in the ground! This is

evidence that it was illegally acquired. It was hidden like anything stolen would be.

Prosecution witnesses such as PW4, PW9, PW10, admit receiving money from D/SP Kasozi. Investigations led to the refund of the money by others like D/IP Mafabi who returned 500,000/= and PC Namahe returned 150,000/=. This evidence apart from the specific denial by D/SP Kasozi, regarding his role in distributing the cash, remains unchallenged on the court record. Why would police officers refund money if it was theirs? Why would the OC/CID give out money so generously for no work done and without disclosing its source? How would the OC/CID account for this money except to say it was from the suspect he had in his custody!

I find as a fact that money recovered including money refunded voluntarily was got from D/SP Kasozi. This money was part or originated from part of the money found with Mr. Makhoha.

Ms. Harriet Angom asked me to find that these recovered funds had been embezzled notwithstanding the fact that it was less than the alleged money in the charge sheet – 130 million.

With respect to the Learned State Attorney, it is improper for a prosecutor to prefer charges stating different facts in the indictment and lead evidence establishing different facts and yet ask the Court to convict a person on the facts stated in the charge sheet. When the evidence adduced is at variance with the allegations in the charge sheet, the case is not proved.

It is only in cases where the prosecution proves a minor and cognate offence that the court might convict on the lesser crime even if it was not charged.

The scenario in this case is different because the charge sheet states that 130 million was stolen, yet there is only proof of about 16.3 million on the evidence adduced.

It cannot be said that 16.3 million is a minor and cogent offence to 130 million. If the prosecution had been diligent, as it is expected to be when conducting a prosecution, it should have amended the charge sheet in the lower court to adjust the amount from 130 million to 16.3 million.

This was more compelling because Makhoha Godfrey, from whom these funds were obtained, declined to testify for the prosecution in this case. At that stage diligence on the part of the prosecution would have compelled it to amend the charge sheet to tally with the evidence.

As it stands now, the facts in the charge sheet are at variance with the evidence adduced. On that basis, it would not be proper for the lower court to convict the respondents for stealing money to the tune that the prosecution could not prove. The figure of 130 million remains a rumour.

I find that the respondents are not guilty of Embezzlement not because the source of the money is unknown, but because the charge sheet is stating a different amount vis-a-vis the evidence adduced in court. The prosecution cannot benefit from its failure to amend the charge sheet to tally with the facts of the evidence it adduced in court.

Consequently, for different reasons I find that the Learned Chief Magistrate was right not to find guilty or convict the respondents on Count 1.

Was the Trial Court right in finding the respondents not guilty on the Count of Abuse of Office? To constitute an offence of Abuse of Office the prosecution should adduce evidence that proves that the accused did

an act that was arbitrary and prejudicial to the interests of the employer in abuse of the authority of his or her office.

The term arbitrary is an English word defined in the 7th edition of Oxford learner's dictionary as:-

“ an action, decision or rule not seeming to be based on reason, system, or plan and at times seems unfair or breaks the law”.

There is abundant evidence on record to show that D/SP Kasozi, as the officer in charge of CID was in charge of this exhibit. When D/C Bwambale who testified as PW7 went to inquire from the OC/CID whether the exhibit needed to be exhibited and stored he was told that there was no money to be exhibited in the store. D/C Bwambale was the exhibit storeman. This means that D/SP Kasozi managed the exhibit.

PW7 faulted the OC/CID for taking over his duties as an exhibit store man. The reason is not difficult to find. This was not an ordinary exhibit. It was money. Temptations were all over the place.

Witnesses such as PW4, PW9, PW10 and others directly received or saw the OC/CID giving out lavishly sums of money without any work done or disclosing its source. Civilians such as PW10, witnessed up to 28 million being given out to her brothers to take to their mother Adongo. Adongo was also the mother of Makhoha who had been arrested with the money. Indeed part of this money was recovered from a banana plantation buried in the ground. PW10 was positive in cross-examination that she saw D/SP Kasozi give it to her brothers Okweny and Omolo.

Out of this money given to Okweny and Omolo, their brother PW11 Osako JB picked 1 million from their mother Adongo. Other police officers who received the money refunded it when they were questioned while others including D/SP Kasozi were searched and found with some

balances meeting the descriptions of the denominations that constituted the stolen money.

On the basis of this conduct by D/SP Kasozi, it is my finding that he acted arbitrarily in spending funds constituting part of an exhibit recovered from a suspect. It is a fact that he dished out money to his subordinates and to civilians related to the suspect. It is also a fact that he managed the exhibit and did not involve the exhibit store man. His actions were not based on reason and were out rightly illegal.

As a Senior police officer, he failed to manage himself and got excited which made him share out money that was never his but an exhibit in a criminal case. He was sympathetic to the suspect by sending 28 million to his mother and was "benevolent" to his juniors who had been on duty that night by giving them some money to enjoy and to others to take tea. This kind of irresponsible behavior or indeed criminal conduct by a senior officer can only amount to Abuse of the authority of his office.

In acquitting D/SP Kasozi and the others, the Trial Chief Magistrate held that there was no evidence that Makhoha had more money than what was exhibited. She therefore concluded that the accused could not have mishandled an exhibit when they declared what they recovered.

With respect I am unable to agree with the Learned Chief Magistrate that there was no evidence of more money than the 150 million. Indeed the Chief Magistrate herself admitted money to the tune of 16.3 million as an exhibit. This money had been recovered from various persons who all trace its origin to D/SP Kasozi.

D/SP Kasozi's lavish spending and charitable character, was triggered immediately Makhoha was booked into the station. It is a fact that Makhoha was brought to the station with a bag of money. Junior police officers who asked D/SP Kasozi to explain the source of money were

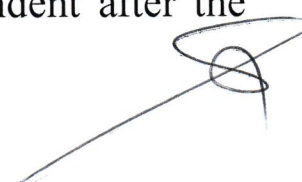
either told to go away, or were commended for being on night duty that day.

There is a strong connection, therefore, between the monies D/SP Kasozi lavishly spent immediately after booking in the suspect Makhoha with the money that Makhoha stole from Kampala. D/SP Kasozi's sudden charitable life style can only be attributed to the excess funds beyond the 150 million that he laid his hands on after the same had been recovered from suspect Makhoha. This conduct soon after booking in the suspect arrested with loads of money leads to an irresistible inference that D/SP Kasozi, who is the second respondent recovered more money from Makhoha than he declared. Denials by witnesses such as PW4, PW8 and PW16 that only 150 million was recovered can only be lies because there is evidence that they were beneficiaries of D/SP Kasozi's cash bonanza.

It would be naïve to believe that the money recovered from persons that got it from D/SP Kasozi, was not part of the money found with Makhoha.

On the basis of the facts, the charge of Abuse of Office should have been preferred in the alternative to the Count of Embezzlement.

It is my conclusion that D/SP Kasozi was at the center of distributing free monies he obtained from the suspect Makhoha. The acts of dealing with the exhibit the way he did was criminal and prejudicial to the state that employed him to protect exhibits to be used as evidence in Court. I find him guilty of the charge of Abuse of Office. There was sufficient evidence to support the conviction of the second respondent after the trial

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I have not been able to find evidence suggesting that SP Ajuna Mark or D/SGT Eunu Annet Ruth, acted in common with D/SP Kasozi in distributing these funds.

It was D/SP Kasozi's docket as OC/CID to manage and supervise the suspect and the exhibits. He may have distributed some of these funds to his boss or colleagues, SP Ajuna Mark and D/SGT Eunu, but there is no evidence that the three acted in common.

Consequently, I do not find evidence of Abuse of Office against SP Ajuna Mark and D/SGT Eunu Annet Ruth. For different reasons I would support their acquittal by the Chief Magistrate.

In conclusion the appeal is dismissed as against SP Ajuna Mark and D/SGT Eunu Annet Ruth. However the appeal succeeds in part against D/SP Kasozi Jackson who I find guilty of Abuse of Office.

I set aside the order of acquittal of D/SP Kasozi and substitute it with a finding of guilty. I convict him of the offence of Abuse of Office C/S 11(1) ACA, 2009.



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Lawrence Gidudu

Judge

16th Nov 2018

16/11/18
H. Angom Jr Appelleur
San Busingye Jr Representant.
12 Fils - clerc
(J) - Read in open court.
16/11/18

REASONS AND SENTENCE

The convict is a 1st offender, he was the officer in charge CID in Kumi District. He gifted himself and others with an exhibit recovered from a criminal suspect. He is aged 44 years, although physically he appears to be above 50. He is said to have children and a lot of dependants. He is said to be the sole bread winner for all those persons. He has been on interdiction since 2016. He has asked Court to impose a lenient sentence constituting a caution or fine.

On the other hand the prosecution asked Court to take note of the rampant mismanagement of exhibits by police officers. She asked me to give him a chance to reform, but at the same time sending a message to others in charge of exhibits that they would be punished.

I have considered the submissions by the prosecution, defence counsel and the convict himself. The conduct of the convict in falling to the temptation of the money exhibit before him, betrayed his responsibility as a Superintendent of police in charge of investigations, suspects, and exhibits found on them.

I am mindful that by this conviction, the convict automatically is disqualified from holding a Public office for a period of 10 years, under section 46 of the Anti- Corruption Act 2009.

It is incumbent upon me and also a judicial responsibility of this Court to impose sentences that reflect the gravity of the offence and protect the public interest.

The punishment for Abuse of Office is imprisonment not exceeding 7 years or a fine not exceeding one hundred and sixty eight currency points (3.36 million).

While no evidence was provided to support the convicts claim to be a patient of high blood pressure, his physical appearance on the face of it tells the story. He does not only look sick, but also looks very old. By this conviction he is certainly out of the job. He is effectively dismissed from the Police Force unless the Court of Appeal sets aside this conviction.

It is important that other Police Officers with responsibility such as the one he had are made to know that if they help themselves with the exhibit or part of it they will be punished.

I will exercise leniency but still impose a sentence that communicates the message that police officers messing up with exhibits stand to be punished including loss of their jobs.

I am not inclined to impose a fine which would make it appear as if a person can steal a money exhibit and use part of it to pay a fine and walk away keeping the balance. That would not meet the ends of justice.

Consequently doing the best I can, for the reasons that the mitigating factors are substantial, I sentence the convict in accordance with the Sentencing Guidelines of 2013, to one year's imprisonment.

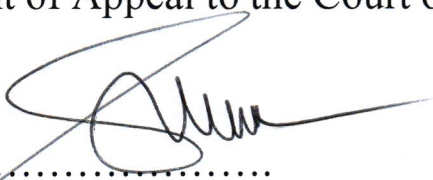
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Lawrence Gidudu

Judge

16th /November 2018

Right of Appeal to the Court of Appeal within 14 days explained.



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Lawrence Gidudu

Judge

16th /November 2018